

STATEMENT OF THE CASE

George W. Hill, Jr. appeals the trial court's restitution order after Hill pleaded guilty to Burglary, as a Class B felony. Hill raises two issues for our review, which we consolidate and restate as whether the trial court erred in ordering him to pay restitution as a condition of his probation without first determining Hill's ability to pay.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On January 22, 2008, Hill pleaded guilty to burglary, as a Class B felony, after he had burglarized the dwelling of Mary Cole in May of 2001. Among other things, Hill had stolen from Cole \$18,562.80 in jewelry, for which Cole had recovered \$1,000 on an insurance claim. Pursuant to the guilty plea, Hill agreed to serve ten years executed and one year suspended to probation. And as a condition of his probation,¹ Hill agreed to pay restitution to Cole. The amount of Hill's restitution was to be determined by the court at a subsequent hearing.

On February 20, 2008, the trial court held a hearing on the amount of restitution Hill would be required to pay to Cole. The trial court did not make an explicit finding as to Hill's ability to pay restitution or conduct a separate hearing on his ability to pay. However, the court did state the following:

¹ Hill argues on appeal that the trial court interpreted the restitution provision of his plea agreement as a part of his sentence and not as a condition of his probation. We disagree that the trial court interpreted the guilty plea in that manner. But, in any event, the restitution provision of Hill's guilty plea plainly is a condition of his probation. See Appellant's App. at 24.

The way this case was resolved, Mr. Hill, given his criminal history and the amount of time that he's gonna be on probation and so forth, the legal system, as far as the criminal case, has a limited amount of ability to get him to pay restitution. Uh . . . Frankly, I'd be surprised if he paid hardly any no matter what amount I come up with as how much you lost because not just anybody is gonna hire somebody with the string of felony convictions that Mr. Hill has. And, truthfully, even if he genuinely wanted to try to work two or three jobs he probably couldn't get jobs that paid very much so his ability to pay any significant amount of restitution, anything close to what you figure you probably lost, you know, in comparison to that [is] very limited, I think.

So to some extent I think this is an exercise, you know, somewhat in mostly futility. . . . Because I don't think you'll probably end up getting very much restitution. Even if he wanted to pay you restitution I don't think he'd probably be able to pay you a whole lot, you know, in truth. Because let's face it, who's gonna hire Mr. Hill? Not very many places are gonna hire him or pay him very much given his circumstances when he gets out of prison

. . . So that right there would be seventeen thousand five sixty-two eight. I don't think there's any way that Mr. Hill could possibly pay anything close to that. . . .

But if it matters to anybody then the Court is finding that . . . Mr. Hill owes restitution beyond the jewelry amount but it seems needless to make a finding about what it is. . . . [T]he Court finds that Mr. Hill owes restitution in the amount of seventeen thousand five hundred sixty-two dollars and eighty cents and the Court is ordering Mr. Hill to pay . . . a reasonable amount of restitution on a monthly basis when he gets out of prison.

. . . The Court orders . . . the defendant to pay a minimum of two hundred dollars a month . . . if circumstances allow, and a higher figure [if] possible, if that's reasonable for him to do so, to pay more than that. But I'd be surprised, if I were you, if you got anything. . . .

* * *

THE COURT: He can't be sent to jail or prison for not paying, uh, the total amount of restitution the Court has found, unless there's a further finding that he had the ability to do so.

Transcript at 87-89. Thus, the court ordered Hill to pay to Cole \$17,562.80, to be paid in monthly installments of \$200 “if circumstances allow.” Id. at 89. The court then found Hill indigent for purposes of this appeal.

DISCUSSION AND DECISION

Hill appeals the trial court’s order that he pay restitution as a condition of his probation. Trial courts are accorded broad discretion in establishing conditions of probation. Rodriguez v. State, 714 N.E.2d 667, 670 (Ind. Ct. App. 1999), trans. denied. A probation order will be set aside on appeal only upon a showing that the trial court abused its discretion. Id.

Our Supreme Court has recently discussed restitution as a condition of probation:

The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. Haltom v. State, 832 N.E.2d 969, 971 (Ind. 2005). Restitution also serves to compensate the offender’s victim. Id. And, when the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant’s ability to pay. See Ind. Code § 35-38-2-2.3(a)(5) (“When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.”). This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant’s failure to pay restitution. Jaramillo v. State, 803 N.E.2d 243, 250 (Ind. Ct. App. 2004).

Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008). Further, “[w]hen making this inquiry, the trial court should consider factors such as the defendant’s current financial status, health, and employment history.” Laker v. State, 869 N.E.2d 1216, 1221 (Ind. Ct. App. 2007).

Here, the trial court entered a restitution order against Hill for \$17,562.80 as a condition of his probation. On appeal, Hill challenges both the trial court's failure to determine his ability to pay restitution and the total amount of restitution.² In response, the State "does not contest that an inquiry into Defendant's ability to pay is required, but instead [asserts] that this inquiry does not require remand at this time and can wait until Defendant is released to probation." Appellee's Brief at 3.

The trial court abused its discretion when it ordered Hill to pay to Cole, as a condition of Hill's probation, \$17,562.80 in restitution without first determining Hill's

² Because Hill challenges the trial court's lack of inquiry into his ability to pay restitution, Hill's case is unlike Pearson. There, our Supreme Court affirmed the trial court's restitution order even though the trial court did not inquire into the defendant's ability to pay because the defendant challenged neither "the amount of the restitution he has been ordered to pay" nor whether he had an ability to pay. Pearson, 883 N.E.2d at 773.

Hill also argues that the trial court erred in ordering him "to make restitution payments beyond his probationary term." Appellant's Brief at 9 (capitalization removed). But that argument is without merit. As our Supreme Court stated:

Implicit in [the defendant's] argument is the assumption that his obligation to make restitution terminates upon the end of his probationary term. However, this is not so. As a general proposition once a term of probation has expired, the trial court loses all jurisdiction over the defendant and is powerless to enforce any conditions of probation, even though it is aware that the defendant has failed to meet a condition. White v. State, 560 N.E.2d 45, 46 (Ind. 1990). But the expiration of a probationary period does not terminate an obligation to make restitution to a crime victim. See I.C. § 35-50-5-3(f) ("Regardless of whether restitution is required . . . as a condition of probation or other sentence, the restitution order is not discharged by the completion of any probationary period or other sentence imposed for a felony or misdemeanor."); see also Savage v. State, 655 N.E.2d 1223, 1225 (Ind. 1995) (upholding a restitution order as a term of a two-year probation in the amount \$164,998.59—which was in excess of the defendant's current assets, and in excess of his lifetime discretionary income—but remanding to the trial court to determine a "periodic payment amount that [the defendant] can or will be able to afford").

The expiration of [the defendant's] one-year probationary term does not terminate his obligation to pay restitution.

Pearson, 883 N.E.2d at 773-74 (second alteration original).

ability to pay that sum. Indiana Code Section 35-38-2-2.3(a)(5) permits trial courts to impose restitution as a condition of probation, but in doing so “the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.” “This language clearly requires the trial court to ascertain the defendant’s ability to pay.” Sales v. State, 464 N.E.2d 1336, 1340 (Ind. Ct. App. 1984); see also Pearson, 883 N.E.2d at 772 (“when the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant’s ability to pay.”).

However, the trial court here conducted no inquiry into Hill’s financial situation before ordering Hill to pay more than \$17,000 in restitution. Although the trial court remarked that it was unlikely Hill would obtain employment upon his release from prison, the trial court did not inquire into “factors such as the defendant’s current financial status, health, and employment history.” Laker, 869 N.E.2d at 1221. And notwithstanding the lack of inquiry, the trial court declared Hill indigent for purposes of assigning to him appellate counsel.³

We also briefly address the State’s arguments on appeal. First, the State asserts that the trial court did not err because it “did inquire into his ability [to pay]. Specifically, it indicated that he had no ability to pay.” Appellee’s Brief at 3. That argument might well characterize the trial court’s statements, but it leads to a conclusion

³ Although it is not clear how, if Hill could not afford appellate counsel in the instant case, Hill could nonetheless afford to pay to Cole more than \$17,000 in restitution, we note that “[t]he fact that the trial court found [the defendant] indigent for these purposes does not inherently mean that the trial court would have abused its discretion in ordering restitution.” Laker, 869 N.E.2d at 1221 n.6.

opposite from that advocated by the State. If the trial court determined that Hill had no ability to pay Cole, then the court erred by ordering Hill to pay restitution to her. On remand, if the court finds that Hill has no ability to pay restitution to Cole, its restitution order should reflect that determination.

The State also argues that it is a waste of judicial resources to remand to the trial court with instructions that it determine Hill's ability to pay restitution because that inquiry can appropriately be made when Hill is released from prison. See Shepard v. State, 839 N.E.2d 1268, 1271 (Ind. Ct. App. 2005) (Baker, J., concurring). That might well be "the better rule," id., but we are bound by our Supreme Court's decisions, and—thus far—that court has clearly required a remand in these circumstances. See, e.g., Savage v. State, 655 N.E.2d 1223 (Ind. 1995) (remanding for restitution order). As such, the State's contention that a resolution of this issue be deferred is without merit.

Because the trial court did not inquire into Hill's ability to pay, the court erred in entering its restitution order against Hill. We remand to the trial court with instructions that it determine Hill's ability to pay restitution as a condition of his probation and that it fix the manner of Hill's performance of that condition if the court finds that he is able to pay any amount.⁴ See, e.g., Laker, 869 N.E.2d at 1221; Shepard, 839 N.E.2d at 1270-71.

Reversed and remanded with instructions.

ROBB, J., and MAY, J., concur.

⁴ Hill has a lengthy criminal history and, as such, we recognize that the trial court appears to be more familiar with Hill and his financial capacity than this one appellate record indicates.